

Kluwer Mediation Blog

Unsettlement

Ian Macduff (NZ Centre for ICT Law & School of Law, Auckland University) · Monday, May 26th, 2014

“Have patience with everything that remains unsolved in your heart. Try to love the questions themselves. . . Do not now look for the answers. . . At present you need to live the question.” Rainer Maria Rilke, *Letters to a Young Poet*

At the heart of the idea of mediation is the aim of settlement – the amicable resolution of the issues in contention between parties. As some of the previous entries in this blog series have also indicated, the idea of settlement itself can be contentious: “settlement” assumes the primacy of party autonomy and choice, which can be set against the expectations of public norms and the consistency of principles. Part of the early (left wing) critique of mediation was that, far from underpinning the liberating aspirations of disputants, settlement served rather to sideline and “chill out” the disputants [see R L Abel (ed) *The Politics of Informal Justice*] and to reinforce the notion that conflicts were individual rather than systemic or structural. Writing elsewhere, Abel was concerned with this development in “delegalization”: “Delegalization presupposes that people or entities that interact outside formal legal institutions are roughly equal in political power, wealth and social status Legalization begins with the assumption that is very nearly the opposite: social actors are inherently and unavoidably unequal outside the legal system; therefore the legal system must strive to make them equal within it, and is capable of doing so.” [“Delegalization: A Critical Review of its Ideology, Manifestations and Social Consequences,” in Blenkenburg, Klaus & Rottleitner (eds), “Alternativen Rechtsformen und Alternativen zum Recht,” *Jahrbuch für Rechtssoziologie und Rechtstheorie*, Bd 6, Westdeutscher Verlag (1980), p.40]. Delegalization – and mediation – presuppose either a high degree of consensus on social norms or (constitutively) the legitimacy of generating the justice norms by and for the parties.

Equally – as recent Kluwer blogs have suggested – there’s a parallel conversation about mediation that is concerned with the loss of the public dimensions of law and disputes through the advent of private settlement [see Charlie Irvine at <http://kluwermediationblog.com/2014/05/12/mind-the-gap-mediation-and-justice/>].

However, rather than continuing that important theme, I want to take a different angle on the idea settlement, one that is derived as much from philosophy as it is from the theory and practice of mediation. The proposition is this: while the end game of

mediation may be settlement, an important function of the mediation process and of the mediator is - perversely? - **unsettlement**. That is, unlike the more ritualised combat of litigation or even of arbitration, what mediation may be uniquely able to do - on the way to resolution - is to unsettle the parties, foster uncertainty, create doubt, and dislodge those firmly held commitments that the parties arrived hoping to reinforce. At the heart of this is the central tool of the mediator: the asking of questions. Quite apart from the structure and process of mediation, the distinctive feature of mediation must be the exercise of inquiry in which the mediator leads the parties to their own answers.

This is not new; indeed, this potential for mediation draws inspiration from the most ancient of philosophical traditions, both East and West. As Rebecca Newberger Goldstein writes in her new book, *Plato at the Googleplex: Why Philosophy Won't Go Away* [Pantheon Books, N.Y.; 2014], at the core of Plato's teaching was the unsettling method in which, through his relentless questions (and no answers) he sought to unsettle his students. She writes of the importance of the [philosophical] question taking "centre stage, cracking us open to an entirely new variety of experience." [43]. Here the role of questioning is not merely factual; it's epistemological; it is about the certainties and uncertainties of what we might know: "Knowing how unsettling this inner drama can be, how disorienting it is to feel our certitudes crumbling beneath us . . ."

Similarly, the American political philosopher Michael Sandel suggests that "philosophy demands a critical sensibility, and to try to apply that to everything can be a very disquieting thing - the disquiet is necessary, even if you are unmoored by it." [<http://www.theguardian.com/lifeandstyle/2013/apr/27/michael-sandel-this-much-i-know>]. Substitute - with both Aristotle and Sandel - the process of decision making for "philosophy" and we have the idea that a significant value of mediation can be this introduction of uncertainty and "unmooring". I'm not suggesting, of course, that this is where mediators abandon their disputants, shipwrecked on the shores of doubt; but the thread of this theme throughout the traditions of reflection and discourse is that of the necessary transition through uncertainty.

We can pin this down more to something perhaps more familiar to mediators and facilitators, in order to take it away from what might look more like existentialism than mediation. Many practitioner readers will be acquainted with the Public Conversations Project [<http://www.publicconversations.org>] whose pioneering work in facilitating dialogues on contentious public issues (abortion, environment, immigration, ethnic divisions and so on) has rested on and developed a highly effective set of procedures for citizen dialogues. As the PCP people make clear, it's not the aim of these dialogues to change the parties' minds but rather to bring them to a better understanding of their own and others' positions and to create the possibility of further respectful engagement. At the heart of the structured process of dialogue facilitation is a series of questions, one of which is relevant for my current purposes:

"Many people have, within their general approach to the issue, some dilemmas, mixed feelings, uncertainties, or gray areas. Some people find that in their thinking about the issue, an important value related to [the issue] bumps up against another value that they hold dear. Within your thinking about the issue, are there any dilemmas, value

conflicts, or gray areas that you'd be willing to share?" [Maggie Herzig & Laura Chasin, *Fostering Dialogue Across Divides*, http://www.publicconversations.org/docs/resources/Jams_website.pdf].

The aim here is not to challenge, in any adversarial sense, the values which parties may hold dear - all the more so in these hotly contested areas - but to encourage parties to recognise that even their most cherished certainties may not be watertight. I'd like to think, too, that this is consistent with the aims of the kind of citizen dialogue that John Sturrock wrote about on this blog in relation to the "collaborative Scotland" project [<http://kluwermediationblog.com/2014/03/29/collaborative-scotland/>].

It's a familiar role, then, to see the mediator as one who moves the process along through sequenced questions; and it's clearly a function of that questioning to clarify information, develop focus, and foster collaborative problem solving. What seems also an essential part of this, too, is the function that goes beyond that naive inquiry and reality checking role to this unsettling role of at least opening parties to realistic doubts. I do wonder also, and would be intrigued to hear from others, as to whether this typically becomes the point in a mediation at which movement can happen. Certainly, in my own limited experience of working with the PCP process, it's that "gray areas" question that serves to crack the parties open to new possibilities.

To make sure you do not miss out on regular updates from the Kluwer Mediation Blog, please subscribe [here](#).

The Leading Online Service for International Arbitration

300+ Authors
 Nearly 3,000 awards
 11,000+ court decisions
 2,250+ BITS

Request a free demo now
 KluwerArbitration.com

Wolters Kluwer

This entry was posted on Monday, May 26th, 2014 at 12:41 am and is filed under [Communication](#), [Conflict](#), [Decision making](#), [Dispute Resolution](#), [Mediation Practice](#), [Tactics](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can skip to the end and leave a response. Pinging is currently not allowed.

